# FINAL RECOMMENDATIONS FOR THE MEDICAL BOARD OF CALIFORNIA April 12, 2005

## RECOMMENDATIONS OF THE JOINT COMMITTEE ON BOARDS, COMMISSIONS, AND CONSUMER PROTECTION AND THE DEPARTMENT OF CONSUMER AFFAIRS

**ISSUE #1: Should the licensing and regulation physicians and surgeons be continued by an independent board rather than by a bureau under the Department?**

**Recommendation #1:** ***The Joint Committee recommends that the Medical Board of California should be continued for another four years, and that some key changes must be implemented to assure the Board is able to continue with its consumer protection role.***

**Comments:** The Department made no recommendation regarding the continuation of the Medical Board of California and indicated instead that it is generally supportive of boards being sunsetted and their programs being incorporated into the Department, and therefore that it will not be making recommendations regarding this board and would like to further discuss this issue with the Joint Committee.

The Joint Committee is, however, recommending at this time the continuation of the Medical Board. The Medical Board's current enforcement responsibilities were established by the Legislature in 1975 as part of a watershed legislative deal. That deal (i) placed unprecedented restraints on private lawsuits filed to obtain compensation for harm caused by allegedly negligent physicians; and (ii) created a vigorous Board-run enforcement program designed to identify and discipline potentially dangerous physicians.

Enforcement by the Board is far and away the Board's most critical public protection function. Indeed, physician safety and medical quality are among the most tangible and direct regulatory functions state government performs. Virtually everyone in California has contact with doctors and the medical establishment, and can identify the importance of safe medical practices.

An exhaustive sunset review in 2002 revealed numerous and significant problems with the Board's enforcement and public disclosure practices. The Legislature responded by enacting SB 1950 (Figueora). The Department selected Julie D'Angelo Fellmeth of the Center for Public Interest Law as the Monitor, and chose Tom Papageorge of the Los Angeles District Attorney's Office as the Principal Consultant. SB 1950 also required the Board to undergo sunset review again this year.

In November of 2004, the Monitor issued its 294 page "*Initial Report: Medical Board of California Enforcement Program Monitor.* The Report identifies serious and ongoing deficiencies in the Board's

enforcement program and serious and ongoing deficiencies in the Board's related "diversion" program, which is designed to rehabilitate physicians with drug or alcohol problems. The Report suggests that the Board should be continued. However, it makes 65 specific recommendations, a number of which are appropriate for Legislative consideration this year, and are discussed below.

## ISSUE #2: Should the Medical Board be given authority to raise its licensing fees?

**Recommendation #2:** ***The Board should be authorized to raise its fees to a level that will address its ongoing budget problems, and bring its staffing at least to the level it had in 2000 to allow the Board's enforcement unit to fulfill the public protection function that is its chief mission.***

**Comments:** Physicians pay only $300 per year in licensing fees, and have since 1994. The Board is funded solely from a physician license fees, and other funding from the licensees (such as fines). It receives no money from California's General Fund. Since 1994, the Consumer Price Index has increased by 27.9%, which alone would justify fees at about $382 a year, just so the Board could keep up with the ordinary cost of living increases everyone else notices regularly in their own personal budgets -- not to mention higher wages for its employees. (*Report*, pp. 64-65)

By way of comparison, $382 per year would still be less than California's lawyers annually pay for their practice licenses, which are currently at $390 per year.

But, in addition to simple inflationary factors, the Board's workload has also increased in those ten years. In 1991-92, the Board received 22% fewer complaints than it does today. (*Report*, pp. 66) An additional 22% increase in fees (just to keep up with increased workload) added to the entirely ordinary cost-of-living increases discussed above, would suggest that an appropriate fee level for today would be about $446 per year. Again, by way of comparison, podiatrists, also medical professionals licensed by the state, but with far fewer responsibilities than M.D.s, pay $450 per year for the licenses to practice. (Business & Professions Code sec. 2499.5 (d))

Not only is the Board hobbled by fees that are lower in real terms than they were ten years ago, the Board's enforcement program is further affected because of the lasting effects of the statewide hiring freeze that should never have applied to the Board in the first place. The hiring freeze was imposed on the Board and all of state government by the Governor from 2001-03, and forced the Board in particular to lose almost 45 positions, ***including 29 in their enforcement program alone.*** This was supposedly justified because the state's General Fund faced serious and continuing deficits and was applied to the Board even though the Board obtains no funds at all from the General Fund

The freeze did give the Board an unintended – and fleeting – financial reprieve. With its dramatically declining budget reserves caused by static fees but rising inflation and workloads, the Board's inability to fill vacancies was akin to obtaining an unexpected source of revenue. This, in turn, allowed the Board to pay increases in the hourly rates charged by the Attorney General's office, which have finally gone up after many years from $112 per hour to $139 per hour as of July, 2004, and then will go up again to $146 per hour in July of 2005. This means the Board's expenses for case prosecution will have increased from $6.9 million in 2003-04 to approximately $8.2 million in 2004-05, to $8.7 million in 2005-06. The Board must pay those attorneys out of its own funds, and those costs went up just as the Board's own staff went down.

But now the Board's declining revenues have caught up with it. The Department has informed the Board officially that the Board is headed for sever and increasing deficits, and must address the situation as soon as possible.

**ISSUE #3: Should the Medical Board be given authority to work with the Health Quality Enforcement Unit in the Attorney General's office to coordinate investigation and prosecution functions?**

**Recommendation #3:** ***The Board should be authorized to work with the Attorney General's office and the Department of Consumer Affairs, and to implement Vertical Prosecution. Any program that is developed should be monitored closely by the board and by this Committee to make sure it is achieving the results that are anticipated.***

**Comments:** Many state agencies and most federal agencies require lawyers to work as a team with investigators, with great success. This is called "Vertical Prosecution." In contrast, the Board still has investigators work up cases by themselves, with occasional review by lawyers; when the investigator thinks the case is ready, he "hands it off" to the prosecuting lawyers, who then must address any legal issues the investigator left undone.

Vertical prosecution teams, in contrast, allow lawyers and investigators to view each case *as a whole*, rather than as two, separate and independent sequential steps: the investigation and then the prosecution. The problem is an obvious one to anyone who practices this kind (or any other kind) of law – investigating a case and litigating a case are not independent at all; one informs the success or failure of the other. The two are entirely interrelated and interdependent.

The Attorney General's office is more than familiar with Vertical Prosecution, using it regularly in such areas as Medi-Cal fraud (where the harm is great but not, as here, potentially lethal) The California State Bar also utilizes Vertical Prosecution. In addition, federal prosecutors have relied upon this regulatory prosecution model for years now, with great success in agencies such as the Federal Trade Commission and the U.S. Department of Justice's Antitrust Division. As the Monitor notes, this model has been recommended to the Board for many years now.

There is a "compromise" proposal currently in existence, called Deputy in District Office (or DIDO). The program was initially set out in statute in 1990. Under this program, attorneys work part-time in Board district offices, and can help investigators work up cases. However, this program falls far short of true Vertical Prosecution. As the Report notes, the half-measure has many flaws, and has not delivered the true benefits that Vertical Prosecution would.

The Report clearly and repeatedly recommends implementation of the Vertical Prosecution Model. However, since this will be a significant departure from existing practice (however flawed that current model is), it is important to assure that the advantages of the new system be monitored closely.

**ISSUE #4: Should the Medical Board crack down on physicians who improperly withhold records from the Medical Board?**

**Recommendation #4:** ***Physicians cannot be allowed any longer to flout the law; the Board must enforce existing law, and should be given additional tools to assure that investigations can commence in a timely manner.***

**Comments:** By statute (Business and Profession Code Section 2225), physicians have 15 days from the time they receive a patient's signed release to turn their medical records over to the Board for its investigation of complaints, but physicians routinely flout this legal mandate, and suffer almost no consequences at all for such law-breaking.

The average time it takes to get medical records is astonishing, given what the law requires. The Board's Central Complaint Unit takes 66 days, on average – *five times the legal limit* – to obtain the records it needs to adequately assess the complaints the Board receives. If a complaint then goes to a full investigation, it takes – again, on average – 74 *additional* days – to get the records necessary for a full and proper investigation. Thus, it takes an average of 140 days for the Board *just to get medical records* – when the goal set in statute for the *complete investigation* is 180 days. And these are just averages; obtaining medical records can take much longer than that.

A core part of the problem is that the Board routinely elects not to enforce the 15 day limit, instead resorting to repeated cajoling and practically empty threats – with the effect discussed above. This problem can and should be fixed immediately. Because neither investigations nor disciplinary proceedings can (or should) begin without the full medical record having been reviewed, the 15 day legal limit is the foundation of the Board's entire enforcement program.

The Report recommends that the Board should enforce existing law requiring doctors to turn over medical records a patient has authorized the Board to review. Examples of possible remedies not identified in the Report, but which are available and that might both prompt physician compliance and Board enforcement include:

- Making a failure to abide by the 15 day limit a ground for mandatory discipline, including summary and temporary suspension of a license until the records are provided under the Board's current Cite and Fine authority;
- Mandating that the Board pursue legal action after a certain number of days;
- Allowing the Board to obtain its attorneys' fees from a physician to reimburse the Board for the cost of obtaining records from recalcitrant physicians.

**ISSUE #5: Should the Notice of Intent requirement be replaced with something more helpful to the Board?**

**Staff Recommendation:** ***Business and Profession Code Section 364.1 should be eliminated and replaced with a more effective provision.***

**Comments:** Business and Professions Code Section 364.1 requires attorneys who wish to file a malpractice action against a physician to file a notice with the Board of their intent. The notices filed, however, have proved unhelpful to the Board. Often, they are so vague or broad or lacking in specifics that they fail to assist the Board in knowing whether a particular case might having some allegations in it worth pursuing. It would be more helpful to the Board to require its own licensees to notify the Board whenever they are the subject of a malpractice case. The Board would, itself, have jurisdiction to discipline noncompliance with this provision, unlike the current provision.

**ISSUE #6: Should physicians be required to report to the Board malpractice judgments against them?**

**Recommendation #6:** ***Business and Profession Code Section 802 should be amended to include judgments.***

**Comments:** Business and Profession Code Section 802 requires physicians to report settlements and arbitration awards against them, but not actual judgments. There appears to be no sound reason for this distinction.

**ISSUE #7: Should physicians be required to report to the Board misdemeanor convictions against them if the misdemeanor is substantially related to the qualifications, functions, or duties of a physician?**

**Recommendation #7:** ***Business and Profession Code Section 802.1 should be amended to require physicians to report misdemeanor convictions against them that are substantially related to the qualifications, functions or duties of a physician. The Board should then promulgate appropriate regulations to implement this provision.***

**Comments:** Business and Professions Code 802.1 requires physicians to report certain criminal actions against them, but does not include misdemeanors. While a number of potential misdemeanors may have no connection to a physician's ability to practice medicine, some do – including misdemeanors related to concealing information from patients. The threshold of such reporting should be fairly high, and the Monitor has suggested misdemeanors that are "substantially related to the qualifications, functions, or duties of a physician."

**ISSUE #8: Should the Board's venue statutes be amended to reduce the amount of "forum shopping" that defense attorneys engage in?**

**Recommendation #8:** ***Business and Profession Code 2019 and Government Code Section 11508 should be amended to minimize the problem of forum shopping.***

**Comments:** Business and Professions Code Section 2019 and Government Code Section 11508 provide for venue of administrative and court matters relating to the Board. However, both statutes permit defense attorneys to "forum shop" which is the ability to look around the state for judges the defense feels will be favorable to their side. Thus, cases that originated in Sacramento may wind up being heard in San Diego (or vice versa) because an attorney believes the courts or a particular judge there will be more likely to rule for the licensee. This is both unfair and highly inconvenient.

**ISSUE #9: Should the typographical error in Business and Professions Code Section 2027 be fixed?**

**Recommendation #9:** ***Business and Profession Code Section 2027 (a)(2) should be amended to fix the typographical error.***

**Comments:** In a recent case from the Court of Appeals, a typographical error in Business and Profession Code Section 2027 (a)(2) nearly caused the Board to lose a case. The language in a bill accidentally changed an "or" to "of", a seemingly innocuous change that could be read to suggest the Board does not have authority to post information about its own licensees when the Board, itself, has

disciplined them. The court ultimately ruled in favor of the Board, but this should be rectified in the statute itself.

**ISSUE #10: Should the Little Hoover Commission be requested to conduct a study on the public policy of disclosure of malpractice lawsuits and settlements against physicians?**

**Recommendation #10:** ***The Little Hoover Commission should be asked to study the public policy implications of the laws requiring public disclosure of malpractice lawsuits and settlements against the Board's licensees.***

**Comments:** There has been much discussion and controversy about the importance of the public being aware of malpractice cases against physicians. SB 1950 required greater disclosure, but there are some questions about the effectiveness of this new law. The respected Little Hoover Commission is well placed to conduct an objective study of this issue, to determine how effective the state's current disclosure policy is, and whether it should be amended.

**ISSUE #11: Should the Legislature's command that the Board conduct a study of hospital peer review be carried out?**

**Recommendation #11:** ***Section 805.2 of the Business and Professions Code should be amended to require completion of this peer review study, and place it among the Board's highest priorities.***

**Comments:** In Business and Professions Code Section 805.2, the Legislature required the Board to conduct a study of peer review reporting. That study was to be completed by November 1, 2003. It has not yet been conducted, because of the severe budgetary condition of the Board. Part of the fee increase discussed above should be earmarked specifically to conduct this study, which has a core importance for the Board and the Legislature.

**ISSUE #12: Should the Board's Diversion Program for physicians with substance abuse problems be reviewed by the Bureau of State Audits?**

**Recommendation #12:** ***Request the Bureau of State Audits be charged with a full review of the Board's Diversion Program.***

**Comments:** Rather than discipline physicians with substance abuse problems, the Board allows them secretly to enter a Diversion Program to try and address their problem. The Board's position is one of compassion to the affected physicians, since it attempts to allow them to work on curing the problem they have without being disciplined by the Board.
Because of chronic understaffing and a budget that barely qualifies as sub-adequate, however, the Board's diversion program presents serious questions of public safety. The Enforcement Monitor devoted an entire chapter to this single aspect of the Board, and found numerous problems:

- The program's most important monitoring functions are failing. Urine testing is easy to evade, recordkeeping is spotty at best, and contractors who perform these tasks are far from consistent.

- The program is understaffed and dramatically under funded. During the last ten years, the program has had a 22% increase in participants, and no increase in staff. Caseworkers who are

supposed to be monitoring physicians are overloaded, and can barely keep up; frequently do not keep up.

- The program lacks clear and enforceable rules.

The Monitor specifically recommended that the Bureau of State Audits be charged with a full review of the Diversion Program.